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Anatomy of an Equivalent,

By the Marquess of Halifax, Adapted to the
Equivalent in the present Articles, 1706.

Words are usually Invented and fitted according to the various Designs several Parties may have, either to Delude the People, or expose their Adversaries. The word Equivalent is one of these in the opinion of the Marquess.

The Birth of it is in short this: After many Repeated Essays to dispose *Scotland* to Comply with *English* Terms; there was found a great Aversion on the *Scots* part: Because *England* could not Satisfie them, that *Scotland* should be gainer by their profits. For after Mature Deliberation of our Sage Predecessors. they were all Concluded to be Dishonourable or not Sufficient and Disadvantageous, as not Comprehending Sufficient Encouragement for quitting Our SOVEREIGNTY, INDEPENDENCY, LIBERTIES and LAWS.

Upon this account it was thought advisable by the *English* Commissioners at the last Treaty, to try another Method of attempting their Projects, and to see whether by putting the same thing into another Mould, and Softning an harsh Proposition by a Plausible Term, they might not have better Success,

To this End, instead of an absolute quitting of Our TRADE, LIBERTY, LAWS, and all that is Valuable, upon uncertain Conditions, which was formerly Proposed; now its put into Gentler Language, and runneth thus; If *You SCOTS* will Acquiesce in the Articles Proposed, *You* shall sometime or other have as good a thing for them, This put into the Fashionable Word, is now called an Equivalent.

So much for the Word it self, I shall next first explain what is the Nature of a true Equivalent.

2dly. I shall show what things are not to be admitted under that Denomination.

1st, I shall take Notice, that this Word lieth under some Disadvantage; not to say some Scandal. It is Transmitted hither from

France; and I wish that Our Bargains be not as Extraordinary as the French Kings Equivalents in *Flanders*, who promises largely, and performs as much as he pleases.

Princes and Potentates Enjoys and Prescribes things by Strength and Power, to supply the want of Arguments; and according to Practice in these cases, the weaker are never thought to have an ill Bargain, if they have any thing left them; So that the first Qualification of an Equivalent, must be that the Parties to whom an Equivalent is proposed, must have Power to make his Claim good, for without Force, Perswasions will avail little.

2dly. The next thing to be Considered is, that to make an Equivalent in Reality an Equal thing in the Proposer, it must be a better thing than that which is required by him; just as Good is Subject to the Hazard of not being as Good, conform to the Maxim in Law, *Melior Conditio Possidentis*, the offer is not fair, except the thing offered is better in Value than the thing Demanded. There must be Allowance for removing what is fixed, and there must be something that may be a Justification for Changing. And besides, he that divests himself of any Advantage, and gets in return the very same thing, runs a hazard of losing his Equivalent, If the Partie proposing doth not want the thing he would have in Exchange, his Requiring of it is Impertinent.

3ly Another thing Necessary to the making of a fair Bargain is, that there must be in both Parties a full Liberty of taking or Refusing Concurring, or Objecting, without any Consequences of Revenge, or so much as Dissatisfaction; For it is impossible to treat, where it is an Affront to differ; in that Case there is no mean between the two Extrems, either an open Quarrel or an Entire Submission. The Proposer ought not only to use equal Terms as to the matter, but fair ones in the manner too; There must be no Intimations of Anger in case of Refusal, much less any open Threatning: Such a Stile is so ill Suited to the usual way of Treating, that it looketh more like a Breach of the Peace, than the making a Bargain.

4ly. Violence preceeding Destroyeth all Contract, Besides open Violence, there is a Secret one which may Bribe and Prepossess a great many of the Representatives of a People; which Irregularit Forfeits and Annuls all Articles of Agreement, when carried on in such a manner, that infects, Poisons, and Corrupts the Fountain of Publick Security.

(3)
6ly. To make an Equal Bargain, there must be a Liberty of differing; not only in every thing that is really Essential but in every thing that is thought so by either Party, and most Especially by him who is in Possession of the thing Demanded.

When a Security is desired to be Changed, that side which Demands it, must not pretend to impose upon the other, So as to dictate to them, and tell them without debate, that they are Safe in their Overtures, and as to what they propose, it merits no Answer **AS NOT TENDING** to the End Designed. Whereas the Council on the other side, must Certainly be the most Competent Judges. The hard it cometh from is a great Circumstance, either to invite or Discourage in all matters of Contract, the Qualifications of the Party offering must suit with the Proposition it self, else let it be never so fair, there is Ground for Suspicion, If the Character they bear, doth not Recommend their Justice, wherever their Interest is Concerned: If they happen to be such as by Experience have been found to have an ill Memory for their Word. In these cases thinking Men will avoid dealing not only to prevent Surprise, but to cut off the occasion of Difficulty or Dispute: Witness a Federal Union when King *James* the Sixth went to *England*. It is yet more Discouraging when there are either a Precedent Practice, or standing Maxims of Gross Partiality, in Assuming a Privilege of Exemption from the usual methods of Equal Dealings, Witness *SCOTS* Soldiers not payed for Service.

6ly. In all Bargains there is a Necessity of looking back, and Reflecting how far a present Proposal is Reconcilable, with a former Practice; As in the case of a Law already made, there should be a Privilege Claimed by a new Law, to exempt those from the Obligation of observing it. Or if at least they should pretend to be Judges themselves of the Particular Application of the Equivalent Proposed for the Payment of *English* Debts, then tell you it is Rightly Applied. These Inconveniencies must entirely have the Effect of Raising Suspicion, or rather they are a certain proof, that in such Circumstances, it is Irrational for Men to expect an Effectual Equivalent.

7ly. It is not only unnecessary, but unnatural too, to persuade with Violence, what it is Folly to refuse; to push Men with Eagerness into a good Bargain for themselves, is a Style very much unsuitable to the Nature of the Thing, and is very unbecoming a Gentle-

man; especially if his Constituents be of a contrar Opinion, therefore undecent Expressions in this Case are unmannerly. But it goeth further, and is yet more absurd to grow angry with Men, for not receiving a Proposal that is for their Advantage: Men ought to be content with the Generosity of offering good Bargains, and should give their Compassion to those who do not understand them; but by carrying their good Nature so far as to be Cholerick, in such a case, they would follow the Example of the Church of *Rome*, where the Definition of Charity is very Extraordinary: In her Language, the *Writ de Hæresico comburendo*, is a Love Letter, and burning Men for differing with them in Opinion, howsoever miscalled Cruelty, is as they understand it, the Perfection of flaming Charity.

8th. Another Circumstance necessary to a fair Bargain is, That there must be Openness and Freedom allowed, as the Effect of that Equality which is the Foundation of Contracting. There must be full Liberty of Objecting, and making Doubts and Scruples: If they are such as can be answered, the Party Convinced is so much the more Confirmed and Encouraged to deal, instead of being hindered by them. But if, instead of an Answer to satisfy, there is nothing but Anger for a Reply; it is impossible not to conclude, that there is never a good Answer to give: So that Objections remaining, without being fully Contested, there is an Absolute Bar put to any further Treaty.

There can be no dealing; where one side assumeth a Privilege to impose, so as to make an offer, and not to bear the Examination of it, this is giving Judgement, Inor making a Bargaine. Where it is called unmannerly to object, or Criminal to Refuse, the surest way is for Men to stay where they are, rather than Treat upon such Disadvantage.

9th. In matters of Contract, not only the present value, but the Contingencies and Consequences, as far as they can be fairly proposed, are to be considered. For example, if there should be a possibility, that one of the Parties may be Ruined by accepting, and the other only disappointed by his Refusing; the Consequences are so extremely unequal, that it is not imaginable a Man should take that for an Equivalent, which hath such a Fatal Possibility at the heels of it.

Wherever it falleth out, that by Changing, Enacting or Repealing a Law, the Legislative Power may be misplaced in the hands of those who have a Separate Interest from the Body of a People, there should be no Treaty till it is Demonstrably made out, that such a Consequence shall be absolutely impossible,

10th. It is necessary in all dealing, to be assured in the first place, that

the Party Proposing is in a Condition to make good his offer, that he is neither under any former Obligations, Debts or pretended Claims, or special Grants and Immunities to particular Companies, which may Render him incapable of performing it; else he is so far in the Condition of a Minor; that whatsoever he Disposeth by Sale or Exchange, may be afterwards Resumed.

11. There is a Collateral Circumstance in making a Contract; which yet deserveth to be considered, as much as any thing that belongeth to it; and that is the Character and Qualifications of the Instruments Employed. So that in all Bargains there should be an Equality in the Persons of the Treaters, as well as in the thing Treated of.

The manner of doing things hath such an influence upon the matter, that Men may guess at the End by the Instruments that are used to obtain it, who are a very good Direction how far to Rely upon, or Suspect the Sincerity of that which is proposed. An absurdity in the way of carrying on a Treaty, in any one Circumstance, if it is very gross, is enough to persuade a thinking Man to break off, and take warning from such an ill appearance: So that in all Treaties there is a necessity of Employing proper and fit Mediators who are free from all Suspicion.

Having touch'd upon these particulars, I shall Secondly consider what things are not to be admitted by way of Contract, to pass under the Name of an Equivalent.

2^dy. First Justice is so much Corrupted, that Contracts must necessarily be enforced with a Penalty in case of non observance; nor is a Punishment inserted absolute Security, unless the party Injured be in a Capacity of Inflicting the Penalty. If the offending Party can hinder the other from bringing the Vengeance of the Law upon him, If he hath Strength or Privilege Sufficient to over-rule the Tenor of the Contract, in that case a Penalty is but a word, there is no Consequence belonging to it. So that a Promise of an Equivalent, is no better then a Lead Letter; the Life of a Bargaine is given to it by the Execution of what it containeth; for let it in itself be never so perfect, it dependeth upon those who are Entrusted with seeing it observed. This shows the absolute necessity of the Guavantie for an Equivalent; and that without the above Precautions, a naked Promise is no certain Equivalent.

The observance of Faith is no longer noticed, than Interest leads Men to it, and if once it becomes Impicitable to observe Articles, then Interest will make one commit a breach.

2^dy. In most Bargains there is a Reference to the time

to come; it is therefore to be considered, whether the Party Contracting hath such an absolute Power of Disposing what belongeth to him, as to Secure the other Party, that a posterior Succeeding Power may not quarrel and Rej^t the Conditions of the Contract. For *Par in Parem non habet Imperium*, thus Parliaments alter and Repeal Constitutions made by former Parliaments. So that it will prove a certain Principle, that we are Subject to the Regulations and Alterations of a *British* Parliament, in Trade and every other thing; So that upon the least Demurr on Our side, there is a specious Title to the *Southern Britains* for Confiscation and Conquest: By this Voluntary Surrender, we may happen to incur the Crime of *Felo de se*, that is Self Murder. As the Supream Power gives Conditions and Equivalents: So it is beyond all Dispute, that the same Power may afterwards Refuse and Enjoyn the contrar. If the Conditions in the Treaty appear to a *British* Parliament to be Destructive of the publick Interest, then they may and will innovate the Articles, because the present Parliament cannot bind up a Future Parliament, from promoting the Safety and Benefite of the Nation, or from doing what they will. For Example, if there could be found in this Kingdom a Set of Men, who having a part in the Supream Legislative Power, should as much as in them lieth, betray their Country by a Criminal Engagement, directly opposite to the Nature of their Power, and to the Trust Reposed in them. Yet such a Hellish Device could bind none but the first makers of it, another Generation would never be tyed up by it.

The Eternity of a CLAIM OF RIGHT or Fundamental Laws, intended by those that made it, will be cut off by new Men who shall Succeed them in Power, if they have a different Taste, or another Interest. No Shackles can be imposed upon the Liberty of those who are to Succeed in the same Trust.

For these Reasons, wherever in order to the making a Bargain, a Proposition is advanced to make a new Law, which is to tie up those, who neither can, nor will be bound by it, it may be a good Jest, but never will be a good Equivalent.

34. In the last place let it be Examined, how far a Promise ought to be taken for a Security in a Bargain.

The good opinion Men have of another, is a great Ingredient to Supply the want of immediate Performances.

The earnest of making good a Promise, must be such a Behaviour Proceeding, as may Encourage the Party to whom it is made to Depend upon it: Where instead of that there hath been want of kindness, and which is worse, an Invasion of Right, a Promise hath no Persuading Force.

There must be no visible Interest of the Party promising; to Excuse himself from it, or to Evade it. In Obligations betwixt the Greater and the Lesser, the Precedence is given to the former, because every Man is apt to be his own Judge.

The Power of interpreting Articles or a Promise, entirely taketh away the virtue of them; and therefore such a power ought to be Lodged in hands that have a Liberty, & are able to claim performance; else it would be like agreeing for a Rent, and at the same time making it Criminal to demand it.

A Superiority of Dignity or Power in the Party promising, maketh it a more tender thing for the other Party to Treat upon that Security. The first maketh it a Nice thing to Claim, the *Later maketh it a difficult thing to obtain.*

In several Cases a Promise is in the Nature of a Covenant, and then between Equal Parties, the Breach of it will bear a Suit: But where the Greatness of the Promiser is raised above the Level of Equality, there is no Forfeiture to be taken, it is so far from the Party grieved his being able to Sue or Recover Damages, that he will not be allowed to Explain or Expostulate; and instead of his being Relieved against the Breach of a Promise, he will run the hazard of being punished for breach of good Manners. Such a Difficulty is putting All or a Part of the Payments in the Fire, where Men must burn their Fingers before they can come at it.

That cannot properly be called good Payment, which the Party to whom it is due, may not receive with Ease and Safety. It was a King's Brother of England, who refused to lend the Pope Money, for this Reason, That he would never take the Bond of one, upon whom he could not Distrain.

When GOD Almighty maketh Covenants with Mankind, His Promise is a Sufficient Security, notwithstanding of His Superiority and His Power: Because first, He cannot Err, nor do Injustice. It is the only Exception to His Omnipotence, that by the Perfection of His Being, He is incapacitated to do wrong. Secondly, At the instant of His Promise, by the Extent of His Foresight, which cannot fail, there is no Room left for the possibility of any thing to intervene which might change His Mind. Lastly, He is above the Receiving either Benefit or Inconvenience; and therefore can have no Interest or Temptation to vary His Word, when once He hath granted it.

Now, tho' Supreme Powers are GOD's Vicegerents, yet their Commission not being so large, as that those Qualifications are devolved to them; it is quite another Case: And since the offering of a Security, implyeth it to be Examined by the Party to whom it is proposed; it must not be taken ill, that Objections are made to it, even tho' the Queen her self should be the immediate Proposer.

Let a Familiar Case be put, Suppose a Prince, Tempted by a Passion too strong for him to Resist, should descend so, as to promise Marriage to one of his Subjects; and as Men are Naturally in great haste upon such Occasions, should press to take Possession before the necessary Forms could be complied with, would the Poor Lady's Scruples be called Criminal, for not taking the Security of the Royal Word? Or, would Her Allegiance be Tainted for Refusing the Sacred Person of her Sovereign, because he was impatient of Delay? Courtiers indeed might persuade her to accept it, if she was so disposed; but sure the Exercise of just Power can never claim it. This is a good Caution against Precipitancy, for if We once quite with Our Parliament we cannot mend any Error or Inconvenience that may arise from the Articles: And so Infallibility, no one but the Pope, pretends.

There is one Case, where it is more particularly a Duty, to use very great Caution, in accepting the Security of a Promise or Article; and that is, when Men are Authorized and Trusted by Others to Act for them: This puneth them under much greater Restraints, than those who are at Liberty to Treat for Themselves. It is Lawful, though it is not prudent for any Man to make an ill Bargain for himself; but it is neither the one nor the other where the Party Contracting Treateth on Behalf of another by whom he is Entrusted. Men who will unwarily accept an ill Security if it is for themselves, they are not Responsible to any Body else, but they lie under the Misfortune and the Loss of Committing the Error, by which, though their expose their Judgement to some Censure, Yet their Morality Suffers no Reproach by it.

But those who are Deputed by others to treat for them, upon Terms of best Advantage, though the Confidence placed in them, should prevent the putting any limits to their Power, yet the Condition implied in, or Expressed is that the Persons so Trusted shall neither make an ill Bargain, nor accept a Slight Security.

The Obligation is yet more binding when the Trust is of a Publick Nature. The Aggravation of Disappointing a Body of Men that rely upon them, carries the Fault as high as it can go, and perhaps no Crime of any kind can curd such a Deliberate breach of Trust, or would more justly make Men forfeit the Protection of Human Society.

The great Essential of a Law is, That the Law have a Tendency to the Common Good; for the Design of all Laws is the Publick Interest of the Government, which is a Natural Mean to attain the Publick Felicity: Therefore a Law which conduces not to the Common Welfare, and is not Expedient and profitable, is but a Sorry Law, and I doubt whether it merits the Name and Force of a Law.

Hence we may well conclude, That a Law ought not to be destructive of the present Form of Government; so that no Change should be introduced, unless the Alteration evidently appear to be Advantageous to the State: And that most to be desirable, as to be capable of Demonstration beyond Probability; least under the Pretence of Melioration, the State should be reduced into a worse Condition, than it formerly Enjoyed.

I will add one thing more, which is, That it does not always prove true, to Rely upon Articles, without a Guarantee, because it is the present Interest of the Promiser to make it good. This is a good Inducement, but not certain: For, if the Proposer hath at other Times mistaken his Visible Interest, the Argument will Turn the other way, and his former Errors (let the Inducements be never so great and generous) are so many Warnings to others not to come within the danger of any more.

Interest is uncertain, it varieth conform to Times and Circumstances; 'tis good build upon a Quick-Sand, as upon a Presumption that it shall not alter. Where are People so distinguished from the rest of Mankind, that it is impossible for them to mistake their Interest, or not to leap over it by Excess of Zeal?

I conclude in a word, "Where Distrusting may be the Cause of provoking
" ANGER, and Trusting may be the Cause of bringing or hazarding RUINE,
" the Choice is too easy to need Explication.



